INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of Argument	4
Argument:	
I. Obscene phonograph records are within the plain meaning of the words of the statute, and are patently among the evils which the statute was intended to reach. No rule of statutory construction justifies a disregard of the obvious purpose of the legislature	5
II. The historical background of the legislation demonstrates the long-continued purpose of Congress to prohibit, within the limits of its Constitutional powers, the dissemination of every sort of obscene matter	13
Conclusion	18

CITATIONS

Cases:

Barr v. *United States*, 324 U. S. 83	12
Browder v. *United States*, 312 U. S. 335	9, 12
Eureka Productions v. *Mulligan*, 108 F. 2d 769	11
Gooch v. *United States*, 297 U. S. 124	7
Helvering v. *Stockholms Enskilda Bank*, 293 U. S. 84	7, 8, 9
Mason v. *United States*, 260 U. S. 545	10
Newman v. *Arthur*, 109 U. S. 132	12
Pickhardt v. *Merritt*, 132 U. S. 252	12
Puerto Rico v. *Shell Co.*, 302 U. S. 253	12
S.E.C. v. *Joiner Corp.*, 320 U. S. 344	16
United States v. *Brown*, 333 U. S. 18	7
United States v. *Gaskin*, 320 U. S. 527	7
United States v. *Giles*, 300 U. S. 41	7
United States v. *Gilliland*, 312 U. S. 86	7
United States v. *Raynor*, 302 U. S. 540	7
Vermilya-Brown Co. v. *Connell*, 335 U. S. 377	7

United States Statutes:

Act of March 3, 1863, c. 71, sec. 20, 12 Stat. 701, 705	14
Act of March 3, 1865, c. 89, sec. 16, 13 Stat. 504, 507	13

United States Statutes—Continued

	Page
Act of September 26, 1888, c. 1039, sec. 2, 25 Stat. 496	16
Act of February 8, 1897, c. 172, 29 Stat. 512	12, 16
Act of June 5, 1920, c. 268, 41 Stat. 1060	5, 10-11
Comstock Act of March 3, 1873, c. 258, 17 Stat. 598	14, 15
Criminal Code, sec. 245, 18 U.S.C. (1946 ed.) 396, now 18 U.S.C. (1948 rev.) 1462	2, 5, 10, 11

Miscellaneous:

59 Cong. Rec. 2178-9, 7162, 7297, 8280, 8331	11
H. Rep. No. 580, 66th Cong., 2d Sess.	11
The Motion Picture Industry (Nov. 1947), 254 Annals of The Amer. Acad. of Pol. & Soc. Sci., at pp. 7-9, 140, 155, 157	12
Murray, *New English (Oxford) Dictionary*, 1909, Vol. 7	14
S. Rep. No. 528, 66th Cong., 2d sess.	11
Sutherland, *Statutory Construction*, 3d ed., 1943:	
Sec. 4910	7
Sec. 4914	7, 16
Sec. 5102	12
The Thirteenth Census of the United States, 1910, Vol. X, pp. 524-525	12
Webster's New International Dictionary, 2d ed. (194	14

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 217

UNITED STATES OF AMERICA, PETITIONER

v.

ALEXANDER LAWRENCE ALPERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 14-18) is reported at 175 F. 2d 137.

JURISDICTION

The judgment of the Court of Appeals was entered May 31, 1949 (R. 18-19). On June 30, 1949, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to July 30, 1949 (R. 20). The petition

was filed July 29, 1949, and was granted October 10, 1949. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether Section 245 of the Criminal Code, which prohibits the interstate shipment of "any obscene * * * book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character," prohibits the shipment of obscene phonograph records.

STATUTE INVOLVED

Section 245 of the Criminal Code, 18 U.S.C. (1946 ed). 396, now 18 U.S.C. (1948 rev.) 1462, provided as of the dates involved in this case:

> Importing and transporting obscene books.
>
> Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or

from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy *book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character,*[1] or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made, or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

On December 23, 1948, the respondent was found guilty on two counts of a three-count information[2] which charged him with having knowingly deposited with the Railway Express Agency, for carriage in interstate commerce, certain obscene phonograph records, in violation of Section 245 of the Criminal Code, *supra,* (R. 2-5, 8-9).

[1] The italicized language was not changed in Section 1462 of the 1948 revision of Title 18, nor was there any substantial amendment of the section as a whole.

[2] The respondent waived prosecution by indictment (R. 4-5).

He was fined $100 on each count (R. 8-9). The respondent appealed, on the sole ground that the statute was inapplicable to phonograph records (R. 10-13); he admits that the phonograph records were obscene and that they were deposited for carriage in interstate commerce (R. 15). The Court of Appeals for the Ninth Circuit reversed the conviction upon the ground that obscene phonograph records are not within the prohibition of Section 245 of the Criminal Code (R. 15-18).

SUMMARY OF ARGUMENT

Obscene phonograph records are clearly within the normal meaning of the words "matter of indecent character" as employed in the statute, and equally clearly they are an evil of the sort which the statute was intended to suppress. The court below conceded as much. In such circumstances, where there is a plain legislative purpose, plainly expressed, there is no room for the application of the rules of *ejusdem generis* or narrow construction of penal statutes. Those rules, like every other rule of statutory construction, are no more than devices to aid in the paramount objective of statutory construction, which is to effectuate the purpose of the legislature. The lower court's mechanical application of technical rules of construction in such manner as to defeat a legislative intent, the existence of which the court recognized, was a perversion of the purposes of those rules.

ARGUMENT

I

OBSCENE PHONOGRAPH RECORDS ARE WITHIN THE PLAIN MEANING OF THE WORDS OF THE STATUTE, AND ARE PATENTLY AMONG THE EVILS WHICH THE STATUTE WAS INTENDED TO REACH. NO RULE OF STATUTORY CONSTRUCTION JUSTIFIES A DISREGARD OF THE OBVIOUS PURPOSE OF THE LEGISLATURE.

The statute, insofar as here pertinent, prohibits the shipment of any obscene "book, pamphlet, picture, motion-picture film, paper, letter, writing, print, *or other matter of indecent character.*" [Italics supplied.] This language certainly describes obscene phonograph records, and the court below conceded that they were an evil of the sort which the statute was intended to suppress. (R. 16.)

In order to upset the respondent's conviction, the court below had to find, and did find, that Congress did not include obscene phonograph records within the category of "other matter of indecent character." The reasoning by which it arrived at this conclusion is more ingenious than persuasive.

The word "photograph", said the court, is derived from the Greek words *photos,* light, and *graphos,* a writing. Hence, when Congress, in 1920, added photographic "motion-picture film" to a statute that already contained the English word "writing",[3] it demonstrated that the word "writing" was not used in its broadest sense. "Phonograph" is derived from the Greek *phone,* sound

[3] Act of June 5, 1920, c. 268, 41 Stat. 1060.

and *graphos*. If the word "writing", the court went on, did not "include *light* writing it certainly did not include *sound* writing." (R. 17.) The court concluded that Congress, when it enacted and amended the statute, "was thinking solely in terms of visual representation." Consequently, applying the rule of *ejusdem generis*, the court held that the "other matter of indecent character" which the statute was intended to prohibit was only that matter which transmitted obscene ideas to the brain through the sense of sight.[4] (R. 16-17.)

This reasoning attributes to Congress an almost pedantic erudition in Greek etymology, accompanied by extreme ineptitude in the practical business of preventing the shipment of obscene matter in interstate commerce. The court below admitted that "The use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress. It is matter of indecent character * * *." (R. 16.) But it concluded that Congress, for some reason best known to itself, had made criminal the shipment of an obscene pamphlet, paper, or letter, and possibly even an obscene book in Braille (R. 17), but had not banned an obscene phonograph record. Such an interpretation flies in the face of common sense—a quality for

---

[4] It could be argued that the word "print", as employed in the statute, is broad enough to include phonograph records, which are manufactured by impressing on a plastic disc a particular pattern. However, the Government prefers to rely upon less hairsplitting arguments.

which Congressmen are more renowned than for scholarship in Greek.

The paramount consideration in statutory construction, to which the rule of *ejusdem generis*, and every other rule of construction, are subordinate, is the effectuation of the intent of the legislature. See, *e.g.*, *Gooch* v. *United States*, 297 U. S. 124, 128; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 88-89; *United States* v. *Giles*, 300 U. S. 41, 48; *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Gilliland*, 312 U. S. 86, 93; *United States* v. *Gaskin*, 320 U. S. 527, 529-530; *United States* v. *Brown*, 333 U. S. 18, 26; Sutherland, *Statutory Construction* (3d ed. 1943) Secs. 4910, 4914. As this Court recently put it, in circumstances somewhat like those here presented, "our duty as a Court is to construe the word * * * as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 388.[5]

In the instant case the court below must have recognized that Congress, if it had acted at the time of the legislation with the present situation in

[5] The Court in the *Vermilya-Brown* case held that the phrase "possession of the United States", as employed in the Fair Labor Standards Act, included an island base leased from Great Britain, although neither the Act nor its legislative history contained any reference to leased areas, and the lease had been made after the passage of the Act.

mind, would have construed the "other matter of indecent character" to include obscene phonograph records, for its opinion concedes (R. 16) that "the use of phonograph records to transmit obscene matter involves the same mischief which the statute is designed to suppress."

In *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, the Court construed the phrase "interest on bonds, notes, or other interest-bearing obligations", as used in the Revenue Act of 1926, to include interest received from the United States with a refund of income taxes. The Court said (293 U. S. at pp. 88-89):

> But it is said that the phrase in question must be restricted in accordance with the rule of *ejusdem generis*. The point is not without merit. The phrase reads "interest on bonds, notes, or other interest-bearing obligations." If the rule invoked be held controlling, it would follow that the general words "other interest-bearing obligations" must be assimilated to the particular words "notes and bonds," and restricted to obligations of the same kind. But while the rule is a well-established and useful one, it is, like other canons of statutory construction, only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive. To ascertain the meaning of the words of a statute, they may be submitted to the test of all appropriate canons of statutory construction, of which the rule of *ejusdem generis* is only one. If, upon a con-

> sideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the legislature shall not fail.

The general object of the Revenue Act, the Court said, was "to put money into the federal treasury"; and surely this general object was no plainer than the present statute's general object, which is to keep pornography and the like out of interstate commerce. The tax law there concerned was, the Court said, to be construed strictly in favor of the taxpayer, as a criminal statute is to be construed strictly in favor of the accused; but "The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes * * *." 293 U. S. at p. 93.

The best possible evidence of the intent of the legislature is the language which it employs. Rules of statutory construction and even examination of the legislative history are useful only in so far as they may dissipate ambiguity. This Court said in *Browder* v. *United States*, 312 U. S. 335, 338, in answer to an otherwise plausible contention that the Congressional prohibition of "use" of a fraudulently obtained passport was not intended to apply to use by a citizen to effect re-entry into the United States, "The plain meaning of the words of the Act covers this use. No single argument has

more weight in statutory interpretation than this." In the instant case, it is obvious that obscene phonograph records are included within the normal meaning of the words "other matter of indecent character"; and, indeed, the Court below so conceded. (R. 16.) Moreover, the limitation of the phrase to objects employing visual means of communication renders it almost meaningless, for the statute's enumeration of specific items of this sort is sufficiently comprehensive so that little else would be left upon which the general words might operate. *Mason* v. *United States*, 260 U. S. 545, 554.

In brief, the genus which the phrase "other matter of indecent character" is intended to comprehend is not the genus "matter capable of communicating an obscene idea visually", but the genus "matter capable of communicating an obscene idea"; and the rule of *ejusdem generis* is applicable only to determine whether particular objects fall into the latter category. If this reasoning be accepted, it must also dispose of the contention that the genus of objects intended to be prohibited by Section 245 is limited not only to those objects which can communicate an obscene idea visually but to those which can do so without the aid of any mechanical device, such as a projector or magnifying glass.

Technical rules of construction and Greek etymologies are frail supports upon which to base an inference of legislative intent contrary to the plain meaning of the words employed; and the 1920

amendment of the Act to include "motion-picture film", furnishes no stronger justification for the lower court's reading of the Congressional mind. The court below assumed that Congress, on this occasion, "very properly considered that motion-picture film was not within the classification theretofore mentioned in the statute." (R. 16.) The legislative history shows merely that it was sought to amend the statute by "adding the words 'motion-picture films' to the list" of prohibited articles. H. Rep. No. 580, 66th Cong., 2d Sess.; S. Rep. No. 528, 66th Cong., 2d Sess.; 59 Cong. Rec. 2178-9, 7162, 7297, 8280, 8334. There was no intimation that this change was compelled by a belief that the statute did not already cover the item, and there was no judicial interpretation which might have inspired such a belief. The language of the statute would probably, in fact, have been construed to include motion picture film, without reference to the catch-all provision, for a motion picture film is no more than a strip of "pictures", each of which may be viewed by the simple process of holding it up to a light.[6] At that time there was considerable public alarm about the menace of

[6] *Eureka Productions* v. *Mulligan*, 108 F. 2d 760 (C.A. 2), reveals that obscene motion picture film was treated as subject to seizure under the Tariff Act of 1930, 19 U.S.C. (1946 ed.) 1305, which prohibited the importation of "any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral," but which did not expressly mention either photographs or motion picture film.

immoral films. See *The Motion Picture Industry* (Nov. 1947), 254 Annals of The Amer. Acad. of Pol. and Soc. Sci., at pp. 7-9, 140, 155, 157. While any inference as to the beliefs of Congress when it enacted this amendment is necessarily guesswork, it is much more probable that Congress simply acted out of an abundance of caution.

The force of the foregoing argument is in no wise weakened by the fact that Congress probably did not have phonograph records specifically in mind when it first enacted the statute in 1897.[7] "Old crimes * * * may be committed under new conditions. Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a statute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope." *Browder* v. *United States*, 312 U. S. 335, 339-340. See, also, *Newman* v. *Arthur*, 109 U. S. 132, 138; *Pickhardt* v. *Merritt*, 132 U. S. 252, 257; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257; *Barr* v. *United States*, 324 U. S. 83, 90; Sutherland, *op. cit. supra*, Sec. 5102. As is shown in Point II, *infra*, Congress has long had a general purpose to

[7] Act of February 8, 1897, c. 172, 29 Stat. 512. The phonograph industry was then in its infancy; very likely none of its pioneers had at that date considered its pornographic potentialities. While the phonograph was invented in 1877, the year for which figures are available, was little more than value of all the products of the industry in 1899, the earliest $2,000,000. Thirteenth Census of the United States, 1910, Vol. X, pp. 524-525.

suppress, within the limits of its Constitutional power, the dissemination of every sort of obscene matter. It could not have hoped, when it enacted the statute, to anticipate and enumerate every invention or technical device by which obscenity might be communicated to the human race; and it could hardly have intended to amend the statute whenever a new method of communicating ideas was invented. It took the only feasible alternative when it included among the articles prohibited a category broad and general enough to forestall the activities of such ingenious persons as the respondent.

II

THE HISTORICAL BACKGROUND OF THE LEGISLATION DEMONSTRATES THE LONG-CONTINUED PURPOSE OF CONGRESS TO PROHIBIT, WITHIN THE LIMITS OF ITS CONSTITUTIONAL POWERS, THE DISSEMINATION OF EVERY SORT OF OBSCENE MATTER.

While the formal legislative history of the particular provision here concerned throws no light on the Congressional purpose, the statute must be viewed against its historical background, as one of a series of laws designed to suppress every form of traffic in obscenity. The efforts of Congress to suppress the traffic in pornography and the like go back at least as far as Lincoln's administration. The Act of March 3, 1865, c. 89, Sec. 16, 13 Stat. 504, 507, made it a misdemeanor to mail any "obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent

character"—a list which then included virtually every type of mailable matter which could reasonably be deemed capable of communicating obscenity.[8]

The real progenitor of the statute here concerned, as well as the present legislation prohibiting the mailing of obscene matter, was, however, the Comstock Act of March 3, 1873, c. 258, 17 Stat. 598. His most severe detractors have never denied to Anthony Comstock the quality of thoroughness in his pursuit of immorality, and the Act which he fathered, and which bears his name, was plainly intended to reach every device by which obscene

---

[8] The Act of March 3, 1863, c. 71, Sec. 20, 12 Stat. 701, 705, at that time prescribed what was mailable in the following terms:

> Sec. 20. That the first class embraces all correspondence, wholly or partly in writing, except that mentioned in the third class. The second class embraces all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign. The third class embraces all other matter which is or may hereafter be by law declared mailable; embracing all pamphlets, occasional publications, books, book manuscripts, and proof sheets, whether corrected or not, maps, prints, engravings, blanks, flexible patterns, samples and sample cards, phonographic paper, letter envelopes, postal envelopes, or wrappers, cards, paper, plain or ornamental, photographic representations of different types, seeds, cuttings, bulbs, roots, and scions.

Since the first phonograph was still 14 years in the future, the term "phonographic paper" must have referred either to paper for shorthand writing (see Murray, *New English (Oxford) Dictionary* (1909), Vol. 7, "phonographic-2") or to a type of paper upon which a graph of sound vibrations could be traced by the "phonautograph". See Webster's New International Dictionary (1948) ("phonograph-2-phonautograph"); Oxford Dictionary, *supra*, ("phonautograph").

ideas could be communicated to the human mind. It provided in relevant part:

> That whoever, within the District of Columbia or any of the Territories of the United States, or other place within the exclusive jurisdiction of the United States, shall sell, or lend, or give away, or in any manner exhibit, or shall offer to sell, or to lend, or to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession, for any such purpose or purposes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature * * *, shall be deemed guilty of a misdemeanor * * *.
>
> Sec. 2. That section one hundred and forty-eight of the act to revise, consolidate, and amend the statutes relating to the Post-Office Department, approved June eighth, eighteen hundred and seventy-two, be amended to read as follows:
>
> "Sec. 148. That no obscene, lewd or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character * * * shall be carried in the mail * * *."
>
> Sec. 3. That all persons are prohibited from importing into the United States, from any foreign country, any of the hereinbefore-mentioned articles or things * * *.

The first and third sections were clearly of the broadest possible scope. They included every kind of matter that could then be made into an obscene object, and there can be no doubt that they were intended to reach every manifestation of obscenity, without exception. That intent is part of the context of the act, in the light of which all its provisions must be read. *S.E.C.* v. *Joiner Corp.*, 320 U. S. 344, 350-351; Sutherland, *op. cit., supra*, sec. 4914. If section 2, relating to the mails, had been intended to be narrower, such an intent could be explained only by the wholly untenable assumption that Congress was less concerned with the mailing of some forms of obscenity than with their importation or sale. We submit, however, that the appearance of limited reach in that section is deceptive and is due to the use of language which, while narrower than that used in the preceding section, was nevertheless adequate to achieve the all inclusive purpose of the legislation at its inception in so far as mailable matter was concerned. So viewed, the various sections of the Comstock Act are seen to have been entirely consistent with each other and to have evidenced an undeviating purpose to forbid mailing as well as importation of or traffic in every kind of obscenity.

The present statute stems from the Act of February 8, 1897, c. 172, 29 Stat. 512. That Act prohibited the interstate carriage of the same articles (except motion picture film) as are now prohibited. The specific items listed were taken verbatim from

the then effective Act of September 26, 1888, c. 1039, Sec. 2, 25 Stat. 496, prohibiting the mailing of obscenity, which in turn was practically identical with the mailing provisions of the Comstock Act, *supra*. But there was one significant variation: whereas the general provision of the mailing statute spoke only of any "other *publication* of an indecent character", that of the present act bans any "other *matter* of an indecent character." The reason is plain: Congress considered that many articles which the mails could not handle might be shipped in interstate commerce and therefore chose the broadest possible general term for the statute affecting the latter.

We submit, therefore, that the history of this legislation, like its plain wording, demonstrates an unequivocal Congressional purpose to exclude from carriage in interstate commerce every kind of obscene matter. This purpose the court below should have given effect. Instead, having recognized the purpose, the court proceeded to nullify it by a wholly unwarranted resort to the rules of *ejusdem generis* and strict construction.

But the sole purpose of these, as of all rules of construction, is to achieve the legislative intent, never to frustrate it. The mechanical application of these rules in such manner as to defeat a plain legislative intent is a perversion of that purpose.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
JOSEPH W. BISHOP, JR.,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
ISRAEL CONVISSER,
Attorneys.

NOVEMBER, 1949.